TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 322

ROSCOE HERGET, TRUSTEE IN BANKRUPTCY OF N. L. ROGERS & COMPANY, INC., PETITIONER,

vs.

THE CENTRAL NATIONAL BANK & TRUST COMPANY OF PEORIA, A NATIONAL BANKING CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 5, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No.

ROSCOE HERGET, TRUSTEE IN BANKRUPTCY OF N. L. ROGERS & COMPANY, INC., AN ILLINOIS CORPORATION, BANKRUPT,

Petitioner,

vs.

THE CENTRAL NATIONAL BANK AND TRUST COMPANY OF PEORIA, A NATIONAL BANKING CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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In the
United States Circuit Court of Appeals
For the Seventh Circuit

No. 8418

ROSCOE HERGET, TRUSTEE IN BANKRUPTCY OF N. L. ROGERS & COMPANY, INC., AN ILLINOIS CORPORATION, BANKRUPT,

Plaintiff-Appellant,

vs.

THE CENTRAL NATIONAL BANK AND TRUST COMPANY OF PEORIA, A NATIONAL BANKING CORPORATION,

Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

TRANSCRIPT OF RECORD FILED SEPT. 27, 1943.
PRINTED RECORD.

In the
United States Circuit Court of Appeals
For the Seventh Circuit

No. 8418

ROSCOE HERGET, TRUSTEE IN BANKRUPTCY OF N. L. ROGERS & COMPANY, INC., AN ILLINOIS CORPORATION, BANKRUPT,

Plaintiff-Appellant,

vs.

THE CENTRAL NATIONAL BANK AND TRUST COMPANY OF PEORIA, A NATIONAL BANKING CORPORATION,

Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

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1 Pleas in the District Court of the United States of America, within and for the Northern Division of the Southern District of Illinois, held in the city of Peoria, in said Division and District, before the Honorable J. Leroy Adair, one of the Judges of said Court, on Monday, the 19th day of October, in the year of our Lord One Thousand Nine Hundred Forty-two, and of the Independence of the United States of America, the one hundred and sixty-seventh.

Present:

J. Leroy Adair, United States District Judge.
Robert Grant, United States Marshal.
Howard L. Doyle, United States Attorney.
G. W. Schwaner, Clerk, United States District Court.

Attest:

G. W. Schwaner, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Illinois,

Northern Division.

Roscoe Herget, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Bankrupt, *vs.* The Central National Bank and Trust Company of Peoria, a National Banking Corporation.	Civil Action. No. P-257.

Be It Remembered, that heretofore, to-wit: on the 3rd day of March, in the year of our Lord One Thousand Nine Hundred Forty-three, that being one of the days of the October, A. D. 1942 Term of the District Court of the United States for the Northern Division of the Southern District of Illinois, there was filed in the office of the clerk of the said court, a certain Complaint to Set Aside and Recover Preferences, which said Complaint was and is in the words and figures following, to-wit:

3 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—P-257) * *

COMPLAINT TO SET ASIDE AND RECOVER PREFERENCES.

(Filed Mar. 3, 1943.)

To the Honorable Judges of the District Court of the United States, for the Southern District of Illinois:

Now comes Roscoe Herget, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Plaintiff herein, by Ira J. Covey, his attorney, and respectfully represents:

1. That the plaintiff is the duly elected, qualified and acting Trustee in Bankruptcy of the Estate of N. L. Rogers & Company, Inc., an Illinois Corporation, now bankrupt, and the Defendant, The Central National Bank and Trust Company of Peoria, is a National Banking Corporation, and a resident of the City of Peoria in the Northern Division of the Southern District of Illinois.

2. That the jurisdiction of this Court is invoked upon the ground that this is a suit by a Trustee in Bankruptcy to avoid preferences given by the Bankrupt to the Defendant within four months previous to the date of the adjudication of bankruptcy, as provided by Section 60 of the Acts of Congress relating to Bankruptcy.

3. That on, to-wit, April 11, 1938, the said N. L. Rogers & Company, Inc., an Illinois Corporation, filed a voluntary petition in bankruptcy in this Court, and was afterward on, to-wit, the 11th day of April, 1938, duly and regularly adjudged a bankrupt by this Court, and that there-
4 after, on, to-wit, May 25, 1938, plaintiff was elected * Trustee of said estate in bankruptcy, and that he immediately thereafter qualified as such Trustee and is now the duly elected, qualified and acting Trustee of said estate in bankruptcy.

4. That during all of the said four months period previous to the date of said adjudication of bankruptcy, commencing on the 11th day of December, A. D. 1937, and ending on the 11th day of April, A. D. 1938, the said N. L. Rogers & Company, Inc., now bankrupt, was indebted to the defendant in various sums ranging from, to-wit, $50,-

000.00, to, to-wit, $350,000.00; that the amount of said debt changed from day to day; that said debt during said four months period was either wholly unsecured or, if some portion thereof was secured, the value of the securities held by the defendant belonging to the said N. L. Rogers & Company, Inc., was at all times during said four months period of less value than the amount of such debt; that on each and every of the banking days of said four months period, the said N. L. Rogers & Company, Inc., now bankrupt, made transfer, assignment or delivery to the defendant of certain of its property, to-wit, lawful money of the United States of America, checks, drafts, bonds, stocks or other securities of the property of the said N. L. Rogers & Company, Inc., (the exact nature of such property being unknown to the plaintiff) in the sum or value ranging from the sum of $5.00 to $20,000.00; that the aggregate of said transfers so made by the said N. L. Rogers & Company, Inc., to the said defendant during said four months period is the sum of Three Hundred Eight Thousand One Hundred Twenty-two and 58/100 ($308,122.58) Dollars; that each and every of the said transfers of the property of the said N. L. Rogers & Company, Inc., to the defendant was applied by the defendant on a previously existing or antecedent unsecured debt of the said N. L. Rogers & Company, Inc., to the said defendant Bank.

5. That the said N. L. Rogers & Company, Inc., now bankrupt, at the time it made each and every of said transfers to the said defendant during said four months period was insolvent within the meaning of the Acts of Congress relating to bankruptcy.

6. That the said transfers, assignments and deliveries so made by the said N. L. Rogers & Company, Inc., were made within four months previous to the filing of the voluntary petition in bankruptcy herein by the debtor on, to-wit, April 11, 1938.

7. That the effect of the enforcement of said transfers or assignments of the property of the said N. L. Rogers & Company, Inc., now bankrupt, to the said defendant was to enable the said defendant to obtain greater percentages of its said debts against the said debtor than other creditors of the said debtor of the same class.

8. That the said defendant, at the various times it received said transfers, assignments or payments of said moneys or property of the said debtor, or the agent or agents of the defendant acting therein, had reasonable

cause to believe that the debtor was insolvent within the meaning of the Acts of Congress relating to bankruptcy.

9. That the said defendant has not surrendered such preferences, transfers or payments so made as aforesaid.

Wherefore, plaintiff demands judgment against the defendant for the sum of Three Hundred Eight Thousand One Hundred Twenty-two and 58/100 ($308,122.58) Dollars, with lawful interest thereon from the date of the filing of this Complaint; and that the plaintiff may have such other and further relief as may be just and proper; that the Clerk of this Court issue summons herein for service on the defendant, in accordance with the Statute in such cases made and provided.

/s/ Roscoe Herget,
Trustee in Bankruptcy of N. L. Rogers & Company, Inc., Bankrupt,
Plaintiff.

/s/ Ira J. Covey,
Attorney for Plaintiff,
1223 Jefferson Bldg.,
Peoria, Illinois.

Endorsed: Filed March 3, 1943. G. W. Schwaner, Clerk.

6 And afterwards, to-wit: on the 5th day of March, A. D. 1943, there was filed in the office of the clerk of said court, a certain Summons in a Civil Action, together with the Marshal's Return thereon, which said Summons with the Marshal's Return was and is in the words and figures following, to-wit:

7 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—P-257) * *

SUMMONS.

To the above named Defendant:

You are hereby summoned and required to serve upon Ira J. Covey, plaintiff's attorney, whose address is 1223 Jefferson Bldg., Peoria, Ill. an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service.

If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

G. W. Schwaner,
Clerk of Court.
By Dorothymae Olsen,
Deputy Clerk.

Date: March 3, 1943.

8 Endorsed: District Court of the United States * * (Caption—P-257) * * Summons in Civil Action Returnable not later than 20 days after service. Ira J. Covey, Atty., 1223 Jefferson Bldg., Peoria, Illinois.

Return on Service of Writ.

I hereby certify and return, that on the 3rd day of March, 1943, I received the within summons, and delivered a true copy thereof to F. M. Blossom, President of the within named Central National Bank & Trust Company at Peoria, Illinois, this third day of March, 1943.

/s/ Robert Grant,
United States Marshal.

Marshal's Fees

Travel	$ .06
Service	2.00
	2.06

Endorsed: Filed March 5, 1943. G. W. Schwaner, Clerk.

9 And afterwards, to-wit: on the 19th day of March, A. D. 1943, there was filed in the office of the clerk of said court, a certain Entry of Appearance, which said Entry of Appearance was and is in the words and figures following, to-wit:

19 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—P-257) * *

MOTION TO DISMISS.

ENTRY OF APPEARANCE.

Now comes the defendant, The Central National Bank and Trust Company of Peoria by John M. Elliott, Chester L. Anderson, and Walter Bachrach, and enters its appearance herein, and directs that all notices in this cause shall be served upon its undersigned attorneys.

/s/ John M. Elliott,
/s/ Chester L. Anderson,
/s/ Walter Bachrach,
Attorneys for Defendant.

John M. Elliott,
1401 Alliance Life Building,
Peoria, Illinois,
Telephone 6209.
Chester L. Anderson,
Central National Bank Building,
Peoria, Illinois,
Telephone 3-3884.
Walter Bachrach,
231 South La Salle Street,
Chicago, Illinois,
Telephone State 6862.

Received a copy of the above and foregoing entry of appearance this 18th day of March, A. D. 1943.

/s/ Ira J. Covey,
Attorney for Plaintiff.

Endorsed: Filed March 19, 1943. G. W. Schwaner, Clerk.

11 And afterwards, to-wit: on the 19th day of March, A. D. 1943, there was filed in the office of the clerk of said court, a certain Motion to Dismiss, which said Motion was and is in the words and figures following, to-wit:

12 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—P-257) * *

MOTION TO DISMISS.

Now comes the defendant, The Central National Bank and Trust Company of Peoria, by John M. Elliott, Chester L. Anderson and Walter Bachrach, its attorneys, and moves the court to dismiss the action on the following grounds:

1. It affirmatively appears from the face of the complaint that the said suit in which said complaint was filed was not instituted within two years subsequent to the date of adjudication in bankruptcy of N. L. Rogers & Company, Inc., as required by Section 11e of the Acts of Congress Relating to Bankruptcy.

2. The provision in said Section 11e for "further time" to institute suit does not apply to this case because: (a) the alleged causes of action set forth in said complaint did not exist prior to the filing of the said petition in bankruptcy of said N. L. Rogers & Company, Inc.; and (b) the alleged causes of action set forth in said complaint are predicated upon and created by said Acts of Congress Relating to Bankruptcy, and, therefore, did not exist and could not have existed at any time prior to the date of the filing of the petition in bankruptcy against said N. L. Rogers & Company, Inc.

13 3. That it appears from the complaint (a) that the supposed causes of action set forth therein to recover voidable preferences were created in favor of said trustee in bankruptcy, by virtue of the adjudication in bankruptcy of said bankrupt under the said Acts of Congress Relating to Bankruptcy and not otherwise; and (b) that said complaint, therefore, establishes that said supposed causes of action do not constitute any "claim" (existing before the time of filing of the petition in bankruptcy by said bankrupt, as to which a period of limitation under Federal or State law could run or expire) within the meaning of Section 11e of the Acts of Congress Relating to Bankruptcy.

4. No Federal statute of limitations other than that contained in Section 11e of said Acts of Congress Relating to Bankruptcy, and no State statute of limitations, is ap-

plicable to the alleged causes of action sued upon in the complaint herein.

5. It affirmatively appears from the face of the complaint that it fails to state a claim against the defendant upon which relief can be granted.

John M. Elliott,
Chester L. Anderson,
Peoria, Illinois,
Walter Bachrach,
231 So. La Salle St.,
Chicago, Ill.,
Attorneys for Defendant.

John M. Elliott,
1401 Alliance Life Building,
Peoria, Illinois,
Telephone 6209.
Chester L. Anderson,
Central National Bank Building,
Peoria, Illinois,
Telephone 3-3884.
Walter Bachrach,
231 South La Salle Street,
Chicago, Illinois,
Telephone State 6862.

Received a copy of the above and foregoing motion this 18 day of March, A. D. 1943.

Ira J. Covey,
Attorney for Plaintiff.

Endorsed: Filed March 19, 1943. G. W. Schwaner, Clerk.

14 And afterwards, to-wit: on the 24th day of May, A. D. 1943, the following further proceedings were had in said cause and were entered of record, to-wit:

15 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—P-257) * *

Monday, May 24, 1943.

Court met pursuant to adjournment.

Present, the Honorable J. Leroy Adair, Judge.

And now on this 24th day of May, A. D. 1943, it is ordered by the court that oral arguments on briefs submitted by Plaintiff and Defendant be set on Monday, June 7, 1943, at 2 o'clock p. m.

16 And afterwards, to-wit: on the 7th day of June, A. D. 1943, the following further proceedings were had in said cause and were entered of record, to-wit:

17 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—P-257) * *

Monday, June 7, 1943.

Court met pursuant to adjournment.

Present, the Honorable J. Leroy Adair, Judge.

On this 7th day of June, A. D. 1943, comes the plaintiff herein, by Ira J. Covey, his attorney, and comes also the defendant herein, by its attorneys, Walter Bachrach, John M. Elliott, and Chester L. Anderson;

And now this cause comes on for hearing by the Court on oral arguments on briefs heretofore submitted by both parties hereto, supporting Defendant's Motion to dismiss this cause. And after hearing arguments of counsel for both parties, and not being fully advised in the premises, takes same under advisement.

18 And afterwards, to-wit: on the 2nd day of September, A. D. 1943, a certain Order Allowing Defendant's Motion to Dismiss Complaint, was filed in the office of the clerk of said court and entered of record in said cause, which said Order was and is in the words and figures following, to-wit:

19 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—P-257) * *

This cause arises upon the Motion of the defendant to Dismiss the Complaint alleging that the action is barred by Section 11(e) of the Bankruptcy Act. Said Complaint purports to charge a cause of action to set aside for recovery certain preferences alleged to have been received by the defendant. Further affirmation arose from the Compiaint that the plaintiff was appointed Trustee of the estate in Bankruptcy on May 25, 1938, and immediately qualified as such Trustee, and that this cause of action

was filed with the Clerk on March 3, 1943. This motion having been argued orally, and Briefs having been submitted, the court finds:

The question before the court is purely the construction of Sec. 11(e) of the Bankruptcy Act, which said section contains the following language:

"A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy."

The Statutes of the State of Illinois after setting forth numerous provisions and limitations of the Statute of Limitations applicable to particular causes of action, none of which were applicable to the present cause, contains the following language: All other causes of action shall be commenced within a period of five years from the date the cause of action arose. The cause of action alleged in this Complaint charges that the Defendant accepted certain voidable preferences from the bankrupt, and asks that said preferences be set aside and the defendant be held accountable.

The court finds, that a suit for voidable preference did not and cannot arise under the laws of the State of Illinois, and that the inception of the right to sue arises with the appointment and qualification of the Trustee in Bankruptcy and no Statute of Limitation of the State of Illinois attached or determines the length of time within which the plaintiff shall bring suit; that no cause of action could arise under the Laws of the State of Illinois for voidable preference, and that no cause of action arose nor was anyone capable of enforcement of same until the Trustee was appointed under the Bankruptcy Act, and, therefore, the Statute of Limitation of the State of Illinois was not applicable and that the Statute of Limitation was governed by the Chandler Act which provides for a period of two years within which to bring suit after the appointment of such Trustee; that such limitation of two years was not enlarged upon by the extension of an unexpired time provided by the Statute of Limitation and that in this case more than two years has elapsed between the appointment of a Trustee and the filing of this suit.

Hence, it is the opinion of this court, and the court so

finds, that the Chandler Act provided a limit of two years from the appointment of a Trustee for the filing of a Suit of this nature, and that such construction applies in this case because the cause of action did not arise prior to the time of the appointment of a Trustee, and that this cause of action was created by the Bankruptcy Act and is governed by Section 11(e) of the Bankruptcy Act, and that such limitation provided in such section of two years has expired.

Therefore, the Motion to Dismiss the Complaint is allowed, and said Complaint is dismissed at the costs of the Plaintiff.

Dated at Peoria, Illinois, this 26th day of August, A. D. 1943.

J. Leroy Adair,
United States District Judge.

(Endorsed) Filed Sept. 2, 1943. G. W. Schwaner, Clerk.

21 And afterwards, to-wit: on the 11th day of September, A. D. 1943, there was filed in the office of the clerk of said court, a certain Notice of Appeal, which said Notice of Appeal was and is in the words and figures following, to-wit:

22 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Illinois,

Northern Division.

Roscoe Herget, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Bankrupt, *Plaintiff,* *vs.* The Central National Bank and Trust Company of Peoria, a National Banking Corporation, *Defendant.*	No. P-257.

NOTICE OF APPEAL.

To Circuit Court of Appeals for the 7th Circuit:

Notice Is Hereby Given that Roscoe Herget, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois

Corporation, Bankrupt, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the 7th Circuit from the final order or decree dated August 26, 1943, and filed and entered in the above entitled cause by the Honorable J. Leroy Adair, Judge of said Court on September 2nd, 1943, allowing the Motion of the Defendant to Dismiss said cause and dismissing said cause at costs of the Plaintiff.

/s/ Ira J. Covey,
Attorney for Plaintiff-Appellant.
Address: 1223 Jefferson Bldg., Peoria, Ill.

(Endorsed) Filed Sept. 11, 1943. G. W. Schwaner, Clerk.

23 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 8418.

Roscoe Herget, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Bankrupt, *Appellant.* *vs.* The Central National Bank and Trust Company of Peoria, a National Banking Corporation, *Appellee.*	Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division. Honorable J. Leroy Adair, Judge Presiding.

STATEMENT OF POINTS.

(Filed Oct. 29, 1943. Kenneth J. Carrick, Clerk.)

(1) The District Court erred in dismissing the Complaint and in rendering judgment in bar of the plaintiff's action.

(2) The District Court erred in holding that under Section 11e of the Bankruptcy Act of 1938, plaintiff had only two years from the date of the appointment of the Trustee to bring this action.

(3) The District Court erred in holding that the Illinois 5-year Statute of Limitations (being Sec. 16 of Chapter 83 entitled "Limitations" of Bar Association Statute, 1943) did not apply to this case and that plaintiff's cause

of action was barred in two years from the date of the appointment of the Trustee.

(4) The District Court should have held that Section 11e of the Bankruptcy Act of 1938 made Section 16 of Chapter 83 of the Illinois Statute of Limitations applicable to this case and that the plaintiff had five years from the date of the adjudication of bankruptcy, or until April 11, 1943, to commence this action.

Ira J. Covey,
Attorney for Appellant,
1223 Jefferson Bldg., Peoria, Ill.

24 And afterwards, to-wit: on the 11th day of September, A. D. 1943, there was filed in the office of the clerk of said court, a certain Appellant's Designation of Record to be Contained in Record on Appeal, which said Designation was and is in the words and figures following, to-wit:

25 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—P-257) * *

APPELLANT'S DESIGNATION OF RECORD TO BE CONTAINED IN RECORD ON APPEAL.

The Clerk will please prepare the Record on Appeal herein to the Circuit Court of Appeals for the 7th Circuit and include therein the complete Record in this cause, including all pleadings, motions, orders, decrees, opinions, this designation of record and all other records or proceedings in this cause.

/s/ Ira J. Covey,
Attorney for Plaintiff-Appellant,
1223 Jefferson Bldg., Peoria, Ill.

Received a copy of the above designation this 11th day of September, A. D. 1943.

/s/ John M. Elliott,
/s/ Walter Bachrach,
/s/ Chester L. Anderson,
Attorneys for Defendant-Appellee.

(Endorsed) Filed Sept. 11, 1943. G. W. Schwaner, Clerk.

26 United States of America,
Southern District of Illinois,
Northern Division. } ss:

I, G. W. Schwaner, Clerk of the United States District Court in and for the Southern District of Illinois, do hereby certify that the annexed and foregoing is a true and complete transcript of the proceedings had of record and on file in the matter of Roscoe Herget, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Bankrupt, *vs.* The Central National Bank and Trust Company of Peoria, a National Banking Corporation, Civil Action, No. P-257, (made in accordance with the Designation of Contents of Record on Appeal filed in said cause), as fully as the same appear from the original files and records thereof, now remaining in my office.

In Testimony Whereof I have hereunto subscribed my name and affixed the seal of the aforesaid court at Peoria, this 25th day of September, A. D. 1943.

G. W. Schwaner,
(Seal) *Clerk, U. S. District Court.*

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed record, printed under my supervision and filed on the twenty-fourth day of November, 1943, in:

Cause No. 8418.

Roscoe Herget, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Bankrupt,
Plaintiff-Appellant,

vs.

The Central National Bank and Trust Company of Peoria, A National Banking Corporation,
Defendant-Appellee,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 5th day of May, A. D. 1944.

(Seal)

Kenneth J. Carrick
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the sixth day of October, in the year of our Lord one thousand nine hundred and forty-two, and of our Independence, the one hundred and sixty-seventh.

Roscoe Herget, Trustee in Bankruptcy of N. L. Rogers & Company, an Illinois Corporation, Bankrupt,
Plaintiff-Appellant.
8418 *vs.*
The Central National Bank and Trust Company of Peoria, A National Banking Corp.,
Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

And, to-wit: On the twenty-seventh day of October, 1943, there was filed in the office of the Clerk of this Court, a Stipulation to file Statement of Points instanter, which said Stipulation is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

~~8~~8418.

Roscoe Herget, Trustee in Bankruptcy of N. L. Rogers & Company, an Illinois Corporation, Bankrupt,
Appellant.
vs.
The Central National Bank and Trust Company of Peoria, a National Banking Corp.,
Appellee.

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

Honorable J. Leroy Adair, Judge Presiding.

STIPULATION.

It Is Hereby Stipulated and Agreed by and between the above parties, by their respective attorneys, that the Statement of Points in the above entitled cause which was not

filed in the United States District Court be filed instanter in the United States Circuit Court of Appeals for the Seventh Circuit and made a part of the record and printed in the record.

Ira J. Covey,
Attorney for Appellant.
John M. Elliott,
Chester L. Anderson,
Walter Bachrach,
Attorneys for Appellee.

Endorsed: Filed October 27, 1944. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the twenty-ninth day of October, 1943, the following further proceedings were had and entered of record, to-wit:

Friday, October 29, 1944.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.

Roscoe Herget, Trustee, etc., *Plaintiff-Appellant,* vs. The Central National Bank and Trust Company of Peoria, *Defendant-Appellee.*	8418	Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division

Pursuant to stipulation of counsel it is ordered that the Statement of Points herein be filed and made a part of the record in this cause instanter.

And on the same day, to-wit: On the twenty-ninth day of October, 1943, there was filed in the office of the Clerk of this Court, a Statement of Points, which said Statement of Points appear on page 12 of the printed transcript of record certified herewith.

And afterwards, to-wit: On the thirteenth day of January, 1944, the following further proceedings were had and entered of record, to-wit:

Thursday, January 13, 1944.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Roscoe Herget, Trustee, etc., *Plaintiff-Appellant,* vs. The Central National Bank and Trust Company of Peoria, *Defendant-Appellee.*	Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

8418

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by Mr. Ira J. Covey, counsel for appellant, and by Mr. Walter Bachrach, counsel for appellee, and the Court takes this matter under advisement.

And afterwards, to-wit: On the fifth day of February, 1944, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 8418. **October Term, 1943, January Session, 1944.**

ROSCOE HERGET, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Bankrupt,
Plaintiff-Appellant,

vs.

THE CENTRAL NATIONAL BANK AND TRUST COMPANY OF PEORIA, A National Banking Corporation,
Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

February 5, 1944.

Before EVANS and SPARKS, *Circuit Judges*, and LINDLEY, *District Judge*.

SPARKS, *Circuit Judge*. The trustee in bankruptcy appeals from the dismissal of his action to recover preferences alleged to have been given by the bankrupt within four months previous to the filing of its voluntary petition in bankruptcy. The District Court sustained appellee's motion to dismiss the complaint on the ground that it was barred by the applicable statute of limitations, and the correctness of that ruling is the only question presented to us.

The bill of complaint, filed March 3, 1943, alleged that N. L. Rogers and Company was adjudicated a bankrupt on April 11, 1938, on its petition filed on that date, and appellant was thereupon elected and qualified as trustee of its estate on May 25, 1938. It further alleged that dur-

ing the four-month period prior to the adjudication, the company was indebted to appellee in sums varying from $50,000 to $350,000 from day to day, all of which indebtedness was either unsecured or very inadequately secured, and that during that period the company delivered to appellee money and securities in amounts varying from $5 to $20,000, aggregating $308,122, all of which was applied by appellee on the antecedent unsecured debt, thereby effecting an illegal preference, recovery of which appellant demanded in the full amount.

Appellee contends, and the District Court held, that the action was barred by § 11e of the Bankruptcy Act, 11 U. S. C. A. § 29e:

> "A receiver or trustee may, within two years subsequent to the date of adjudication *or within such further period of time as the Federal or State law may permit*, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. * * *" (Our ital.)

Appellee contends that § 11e fixes a two-year period within which the current suit could be brought, inasmuch as there is no other federal or state law under which the period could be extended. Appellant, on the other hand, contends that the section permits maintenance of the suit by reason of the extension allowed therein by state law, spelling out a five-year period by interweaving § 11e and two sections of the Illinois Statute on Limitations, Chap. 83, Ill. R. S.

The District Court held, we think correctly, that inasmuch as the suit, being one to avoid a preference, arose under the Bankruptcy Act, the Illinois statute of limitations could not operate to fix the time within which it could be brought. It is obvious that the cause of action is predicated solely upon § 60 of the Bankruptcy Act, 11 U. S. C. A. § 96, and although subsection (b) of that section provides for concurrent jurisdiction in state and federal courts for suits brought thereunder, it does not specify the period within which such suits must be brought, hence the applicability of § 11e above. Both parties are agreed that § 11e controls, but they differ as to its proper construction.

In order to arrive at the five-year period which appellant contends applies here, he relies upon §§ 12 and 15 of the Illinois Act. § 12 furnishes the introduction to the scheme for limitations for bringing personal actions: "The following actions can only be commenced within the periods hereinafter prescribed, *except when a different limitation is prescribed by statute.*" (Our ital.) § 15 provides that "all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." Appellant contends that § 11e, in providing for a two-year period, "or * further period of time as Federal or State law may permit," prescribes "a different limitation" which brings § 15 into effect to fix the limitation at the five-year period provided for "all civil actions not otherwise provided for." This is a good illustration of the process of pulling oneself up by one's own bootstraps. The exception contained in each section (11e and 12) must be relied upon to bring into operation that contained in the other before any occasion arises for the application of the § 15 provision for the five-year period. This requires a complex construction of § 11e when in fact the meaning of that section seems quite simple—that where a cause of action has not already expired at the time of the filing of the petition in bankruptcy, a receiver may sue on it within whichever is the longer of two periods, two years, or that provided by the statute permitting or creating the cause. Since it is the Bankruptcy Act which creates the cause of action here, it must provide the period for bringing it, and in the absence of other provision, the two-year one applies.

Appellant contends that if the two-year period here fixed is affirmed, the effect will be to provide one period for the action if brought in the bankruptcy court, and a different one for the same action if brought in the state court, as it may be under the alternative provision of § 60(b). This does not follow. The Illinois limitation statute provides the five-year period only in case no other is provided. But if this case were brought in the state court, since the action could arise only under § 60(b) of the Bankruptcy Act, the limitation provided by that Act would operate just as it would if the cause were brought in the bankruptcy court. There is no applicable state statute for the reason that the cause of action was not created by the state. Appellant cites and quotes from various cases

and text writers, but we find none of his authorities helpful or applicable to the facts here presented, for none of them deal with the effect of § 11e on causes of action created by the Bankruptcy Act. In fact we have found no case strictly in point.

Judgment affirmed.

Endorsed: Filed February 5, 1944. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the fifth day of February, 1944, the following further proceedings were had and entered of record, to-wit:

Saturday, February 5, 1944

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Roscoe Herget, Trustee, etc., *Plaintiff-Appellant,* vs. The Central National Bank and Trust Company of Peoria, *Defendant-Appellee.*	8418	Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Illinois, Northern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed, with costs.

And afterwards, to-wit: On the nineteenth day of February, 1944, there was filed in the office of the Clerk of this Court, a Petition for Rehearing, which said Petition is in the words and figures following, to-wit:

No. 8418

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

ROSCOE HERGET, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Bankrupt,

Plaintiff-Appellant,

vs.

THE CENTRAL NATIONAL BANK AND TRUST COMPANY OF PEORIA, a National Banking Corporation,

Defendant-Appellee.

Appeal from the District Court of the United States, Southern District of Illinois, Northern Division.

Honorable J. Leroy Adair, Judge Presiding.

Appellant's Petition for Rehearing.

FEB 19 1945

IRA J. COVEY,
1223 Jefferson Bldg.,
Peoria, Ill.,
Attorney for Appellant.

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 8418

ROSCOE HERGET, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Bankrupt, Plaintiff-Appellant, vs. **THE CENTRAL NATIONAL BANK AND TRUST COMPANY OF PEORIA, a National Banking Corporation,** Defendant-Appellee.	Appeal from the District Court of the United States, Southern District of Illinois, Northern Division. Honorable **J. Leroy Adair,** Judge Presiding.

Appellant's Petition for Rehearing.

To the Honorable Presiding Judges of said Court:

Now comes Roscoe Herget, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, bankrupt, Plaintiff-Appellant and Petitioner herein, and petitions the Court to grant a rehearing herein, in accordance with Rule 22 of this Court, and in support thereof respectfully makes the following suggestions:

On page 3 of the opinion of the Court it is said that the meaning of Section 11e of the Bankruptcy Act "seems quite simple—that where a cause of action has not already expired at the time of the filing of the Petition in Bankruptcy, a receiver may sue on it within whichever is the longer of two periods, two years, or that provided by the statute permitting or creating the cause. Since

it is the Bankruptcy Act which creates the cause of action here, it must provide the period for bringing it, and in the absence of other provision the 2-year one applies."

The Court here holds that suit may be brought by a receiver or trustee within whichever is the longer of the two periods, two years, or that provided by the statute permitting or creating the cause.

The Federal Statute (Sec. 60b of the Bankruptcy Act) permits the suit to be brought in the State Court, and when it is brought there, it being an action created by statute, it is a cause of action not otherwise provided for within the meaning of Section 15 of the Illinois Limitations Act and is not barred until five years after the date of the accrual of the action. See *Parmelee* v. *Price*, 208 Ill. 544-559; *Blakeslee Warehouses Inc.* v. *City of Chicago*, 369 Ill. 480-485 and other cases cited on page 8 of our original brief.

The result of the Court's reasoning, as it seems to us, is that when the suit is brought in the federal court, the action will be barred in two years and when in the state court, will be barred in five years.

True it is that the action is created by the federal statute but it is equally true that it is an action not otherwise provided for by Section 15 of the Illinois Limitations Act which, under the Illinois cases, is barred in five years. It is not material as to whether the action was created by the Bankruptcy Act or existed at common law.

It is also true that the situation arising under the Illinois Act is somewhat complex, but that does not justify a reading into Section 11e of a condition or exception that does not appear therein. See *Rybold* v. *Jarrett*, 112 Fed. (2d) 642 (4th Cir.).

The construction placed upon Section 11e by the Court, in our opinion, is contrary to the meaning as found in

the Report of the House Judiciary Committee filed July 29, 1937, Report No. 1409. See original brief, page 16.

Section 11e of the Chandler Act applies equally to all causes of action. The character of the suit is immaterial. See cases cited page 11 of our original brief.

The decision of the Court, in our opinion, is contrary to the weight of authority on the subject. See cases cited paragraph 13 of our original brief.

On page 3 of the opinion of the court it is said: "Since it is the bankruptcy act which creates the cause of action here, it must provide the period for bringing it, and in the absence of other provision the 2-year one applies." We do not think that this necessarily follows. Section 11e permits the suit to be brought during the period provided by either the state or federal law and as the state law permits the suit to be brought within five years, the federal court should also permit it to be brought within the same length of time.

For the foregoing reasons, it is respectfully submitted that a rehearing of this case should be granted.

Respectfully submitted,

IRA J. COVEY,
1223 Jefferson Bldg.,
Peoria, Illinois,
Attorney for Plaintiff-Appellant.

Endorsed: Filed February 19, 1944. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the fifth day of April, 1944, the following further proceedings were had and entered of record, to-wit:

Wednesday, April 5, 1944.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Roscoe Herget, Trustee, etc., *Plaintiff-Appellant.* vs. The Central National Bank and Trust Company of Peoria, *Defendant-Appellee.*	8418	Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division

It is ordered by the Court that the Petition for a Rehearing of this cause be, and it is hereby, denied.

And afterwards, to-wit: On the fourteenth day of April, 1944, the Mandate of this Court issued to the District Court of the United States for the Southern District of Illinois, Northern Division.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the proceedings had and papers filed, excepting appearances of counsel, briefs of counsel and motions and orders extending time for filing briefs, in:

Cause No. 8418.

Roscoe Herget, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Bankrupt,
Plaintiff-Appellant.

vs.

The Central National Bank and Trust Company of Peoria, A National Banking Corporation,
Defendant-Appellee.

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 5th day of May, A. D. 1944.

(Seal)

Kenneth J. Carrick
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

[fol. 34] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1943

No. —

ROSCOE HERGET, Trustee, Etc., Petitioner,

vs.

THE CENTRAL NATIONAL BANK AND TRUST COMPANY OF PEORIA

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

Upon Consideration of the application of counsel for the petitioner,

It Is Ordered that the time for filing petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 5th, 1944.

Frank Murphy, Associate Justice of the Supreme Court of the United States.

Dated this 10th day of June, 1944.

[fol. 35] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.